Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-592

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATURAL GAS PIPELINE COMPANY OF AMERICA,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM H. SATTERFIELD
General Counsel

BARBARA J. WELLER
Deputy Solicitor

LESLIE J. LAWNER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 5

FPC v. *Memphis Light, Gas & Water Division* 411 U.S. 458 5

FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575 5

FPC v. *Sunray DX Oil Co.*, 391 U.S. 9 5

Mobil Oil Corp. v. *FPC*, 417 U.S. 283 5

Northwestern Public Service Co. v. *FPC*, 522 F.2d 654 5

Transcontinental Gas Pipe Line Corp., 58 F.P.C. 2038 aff'd and remanded *sub nom. Tennessee Gas Pipeline Co.* v. *FERC*, 606 F.2d 1094, cert. denied, 445 U.S. 920 and 447 U.S. 922 2

Statutes:

Natural Gas Act, 15 U.S.C. 717-717w 1

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-592

NATURAL GAS PIPELINE COMPANY OF AMERICA,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioner Natural Gas Pipeline Company of America contends that the court of appeals erred in affirming the Federal Energy Regulatory Commission's orders refusing to allow it to recover from its ratepayers amounts expended for unsuccessful projects to procure new and unconventional gas supplies.

1. Natural is an interstate pipeline company whose sales of natural gas in interstate commerce are regulated by the Commission under the Natural Gas Act, 15 U.S.C. 717-717w. In this case the Commission denied Natural's effort to recover through the rates it charges for its gas the costs it expended in pursuing three unconventional gas projects. The three projects included acquiring leases and an option to property on which to construct a synthetic natural gas facility in North Dakota (the Dunn County project);

acquiring an option to participate in a project to produce liquefied natural gas in Iran (the Kalingas project); and participation in a group studying ways to transport natural gas from Alaska to the lower 48 states (the Gas Arctic project) (see Pet. App. 15a-18a). The Commission concluded that Natural could not recover its losses from these three projects through its rates because from the outset these projects were of an unusually risky nature and they ultimately failed to produce or deliver any gas at all to Natural or its customers (Pet. App. 39a-54a).

The court of appeals upheld the Commission's orders as "a reasoned exercise of its discretion under section 4 of the Natural Gas Act, 15 U.S.C. § 717c" (Pet. App. 12a). The court of appeals recognized both the Commission's long-standing practice of denying recovery of the costs of failed gas supply projects in a pipeline's rates (Pet. App. 19a-20a, 22a) and judicial approval of this practice (Pet. App. 22a-24a).[1] The court of appeals again placed its imprimatur on the Commission's policy of denying a "natural gas pipeline any recovery of costs from supply projects that entirely failed to benefit ratepayers" (Pet. App. 25a-26a). In so doing, the court first rejected Natural's argument that since it acted prudently in expending these costs, it should be allowed to recover them. The court assumed prudent management by Natural, but held that the Natural Gas Act does not make ratepayers guarantors of speculative investments and the Commission can properly find that ratepayers should not be "stuck with the bill" for failed projects (Pet. App. 26a). The court also rejected Natural's argument that the Commission had acted inconsistently by denying its

---

[1]See, *e.g.*, *Transcontinental Gas Pipe Line Corp.*, 58 F.P.C. 2038 (1977), aff'd in relevant part and remanded on other grounds *sub nom. Tennessee Gas Pipeline Co.* v. *FERC*, 606 F.2d 1094 (D.C. Cir. 1979), cert. denied, 445 U.S. 920 and 447 U.S. 922 (1980).

request since the Commission permits the recovery of costs for unsuccessful pipeline storage projects, dry holes drilled by natural gas producers, and unsuccessful electric generation projects (Pet. App. 27a). The court found that the Commission acted properly in distinguishing Natural's request since the Commission "plausibly viewed these three projects as unusually risky ventures" (Pet. App. 30a).

2. The decision below is correct and does not conflict with the decisions of any other court of appeals. Petitioner's fact-bound contentions do not warrant further review.

a. Natural argues (Pet. 10-13) that the Commission's prohibition of recovery of the costs expended in its failed projects was arbitrary because in allegedly similar cases the Commission has permitted utilities to recover expenditures. However, both the Commission and the court of appeals amply demonstrated why the cases on which Natural relies are in fact dissimilar and warrant different treatment.

Natural first argues (Pet. 11) that gas storage projects, for which costs have been allowed even where the project did not succeed, are indistinguishable from the supply projects at issue here. Natural baldly asserts that storage facilities are primarily used for supply enhancement, the same purpose which would have been served by Natural's three failed projects. But, as the court of appeals explained, a pipeline must have storage facilities and "efforts to find and secure those facilities are essential to maintaining the ordinary equipment of a pipeline" (Pet. App. 28a). Efforts to enhance supply, in contrast, are normal activities of producers, not pipelines; "Natural has offered no reason why a pipeline should not be treated like other gas producers when the pipeline attempts to act as a gas producer" (*ibid.*).

Natural also argues (Pet. 11-13) that since electric utilities are permitted cost recovery of expenditures for abandoned nuclear projects, it should receive the same treatment for its abandoned projects. But as the court of appeals noted (Pet. App. 31a), the different treatment is justified by both the varying statutory schemes and the different policies involved in allocating the risks in the two areas. Under Section 7 of the Natural Gas Act, 15 U.S.C. 717f, the Commission certificates all jurisdictional services and facilities, assuring that they will remain in and benefit the interstate gas market. There is no analogous certification process on the electric side. The Commission has therefore developed a prudent investment test to determine if ratepayers should bear the expense of abandoned electric projects, although it normally determines whether ratepayers should bear the cost of gas projects depending on whether a certificate was obtained. As the court of appeals concluded, the difference in the statutory schemes "supports the Commission's different treatment of expenses from the Gas Arctic project and expenses from failed [electric] generation projects in a straightforward way" (Pet. App. 31a-32a), since all the money Natural lost in the Gas Arctic project was spent in unsuccessful pursuit of a certificate. In addition, the Commission's refusal to allow Natural to recover the costs of its Dunn County and Kalingas projects stemmed in part from the fact that they are non-jurisdictional and that the pipelines' jurisdictional customers are not assured of benefiting from such projects even if they succeed, so that they should not be burdened with the costs if they fail. But the critical distinction between the Dunn County and Kalingas projects and the electric projects for which the Commission has approved rate recovery is that the nature of and the likelihood of success for the failed projects here were far more speculative than for the electric projects for which the Commission has approved rate recovery (Pet. App. 33a, 35a-36a).

b. Natural alleges (Pet. 13-15) that the Commission and the court of appeals erred in failing to consider the effect that denial of recovery of its costs would have on its financial health, citing *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), and *FPC* v. *Memphis Light, Gas & Water Division*, 411 U.S. 458, 465-466 (1973). As this Court stated in *Hope Natural Gas*, rates are "just and reasonable" only if consumer interests are protected and the financial health of the pipeline remains strong. The rate set must fall within the "zone of reasonableness"; it must not be so low as to be confiscatory in the constitutional sense. See *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942). In order for Natural to succeed in challenging the rates allowed by the Commission in this case, it must show that the rates fall outside the zone of reasonableness. *Northwestern Public Service Co.* v. *FPC*, 522 F.2d 654, 660 (D.C. Cir. 1975); see also *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 321 (1974); *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 29 (1968); As the court of appeals noted, Natural not only failed to show that its rates are outside the zone of reasonableness, it did not even allege that this is the case (Pet. App. 27a). Therefore, the court of appeals correctly rejected Natural's contention.

c. Finally, Natural argues (Pet. 15-16) that the court of appeals erred in determining that the Commission's findings that Natural's projects did not benefit ratepayers and were unlikely to do so is supported by substantial evidence. It is of course undisputed that the projects did not benefit ratepayers. Furthermore, as the Commission and the court of appeals concluded, the record clearly supports the conclusion that "these three projects were unusually risky ventures" (Pet. App. 30a). In any event, whether they were likely to benefit ratepayers, as Natural contends, is a factual issue not warranting this Court's attention.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

WILLIAM H. SATTERFIELD
General Counsel

BARBARA J. WELLER
Deputy Solicitor

LESLIE J. LAWNER
Attorney
Federal Energy Regulatory Commission

DECEMBER 1985

DOJ-1985-12